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In the Supreme Court of the United States

OCTOBER TERM, 1979

AMOCO PRODUCTION COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 598 F. 2d 370. The orders of the Federal Power Commission[1] (Pet. App. 28a-43a, 44a-49a) are not reported.

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[1]Pursuant to the provisions of the Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7101 *et seq.*, the Federal Power Commission ceased to exist on September 30, 1977, and most of its functions and regulatory responsibilities, including those relevant to this case, were assumed by the Federal Energy Regulatory Commission effective October 1, 1977. Hereinafter, the term "Commission" refers to the FPC or the FERC depending on whether the events occurred before or after October 1, 1977.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on July 5, 1979. The petition for a writ of certiorari was filed on September 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certificates of public convenience and necessity issued in 1965 and 1967 under Section 7 of the Natural Gas Act barred the Commission from imposing conditions in a 1977 certificate (a) to prevent use of the gas subject thereto for boiler fuel, and (b) to require Commission authorization before service under that certificate may be abandoned.

STATUTE INVOLVED

Sections 7(b), 7(c), and 7(e) of the Natural Gas Act, 15 U.S.C. 717f(b), 717f(c), and 717f(e), are set forth at Pet. App. 50a-52a.

STATEMENT

A. *The 1965 Certificate.*

Amoco Production Company ("Amoco") produces and sells natural gas from onshore and offshore fields (Pet. App. 12a). Pursuant to a warranty contract dated November 20, 1964, Amoco[2] and Austral Oil Company, Inc., agreed to sell 584.4 million Mcf of natural gas over a 20-year period to Florida Gas Transmission Company ("FGT") (Pet. App. 15a). In 1964, Amoco applied to the Commission for a certificate of public convenience and

[2]At that time and until 1970, the name of Amoco Production Company was Pan American Petroleum Corporation.

necessity authorizing the sale and delivery of this natural gas to FGT. *Pan American Petroleum Corp.*, 34 F.P.C. 852 (1965).[3]

The Amoco-FGT warranty contract differed from conventional natural gas sales contracts in that it did not dedicate specific acreage, fields, or reserves to its performance (Pet. App. 15a). The Commission granted the certificate in September 1965 (*ibid.*). It expressed concern, however, that this form of transaction might result in insufficient regulatory control over the dedication and abandonment of gas reserves. *Pan American Petroleum Corp.*, *supra*, 34 F.P.C. at 854.

To retain a measure of control over the sales proposed by the Amoco-FGT warranty contract, the Commission attached several conditions to the certificate. It required Amoco to inform the Commission of, and to report any changes in, the fields involved and the parties whose gas was being delivered to FGT. *Pan American Petroleum Corp.*, *supra*, 34 F.P.C. at 855. In addition, the order granting the certificate provided (*ibid.*):

> (C) The grant of the certificate issued in paragraph (A) above * * * is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Applicant. Further, our action in this proceeding shall not foreclose or prejudice any further proceedings or objections relating to the operation of any price or related provisions in the gas purchase contract herein involved.

[3]FGT's purchase constituted a sale in interstate commerce for resale, subject to the Commission's jurisdiction under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b).

Amoco accepted the certificate and, after the order became final, began deliveries under the contract (Pet. App. 17a).

B. *The 1967 Certificate.*

In March 1965, Amoco entered into a direct sales agreement with Florida Power & Light Company ("FP&L")[4] to supply gas for use as boiler fuel for a 20-year term (Pet. App. 29a). FGT separately agreed to transport this gas from Louisiana to FP&L's electric power generating facilities in Florida (*id.* at 13a). The Amoco-FP&L agreement was also a warranty contract that contained no dedication of specific leases or fields (*ibid.*). Because the Amoco-FP&L transaction was a direct sale to an end user and not a sale for resale, it was not subject to Commission jurisdiction.[5] However, FGT's interstate transportation of that gas required Commission authorization pursuant to Sections 1(b) and 7 of the Natural Gas Act, 15 U.S.C. 717(b) and 717f (*ibid.*).

FGT accordingly applied for a certificate of public convenience and necessity authorizing the transportation of the Amoco-FP&L contract gas and the construction and operation of facilities necessary to transport the gas. The Commission granted this certificate in March 1967. *Florida Gas Transmission Co.*, 37 F.P.C. 424 (1967). The certificate order provided that all gas transported to FP&L thereunder had to be produced entirely within the Southern Louisiana area, Mississippi, and other downstream states, and that no more than 85% of the gas produced in the Southern Louisiana area could be from

[4]Austral also agreed to sell gas to FP&L under the same contract.

[5]See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 637-638 (1972); *Panhandle Eastern Pipe Line Co.*, v. *Public Service Commission of Indiana*, 332 U.S. 507, 516-517 (1947).

offshore fields. 37 F.P.C. at 448. The Commission also ordered FGT to file annual reports identifying the total deliveries made to FP&L by Amoco and Austral under the warranty contract. *Id.* at 449.

In May 1967, the Commission approved a settlement that modified FGT's transportation certificate to provide that "from the date deliveries commence through ten years from such date the proportions of gas produced in the off-shore fields (Federal Domain) of Southern Louisiana shall not exceed 82 percent of the total amount of gas produced in the South Louisiana area." *Florida Gas Transmission Co.*, 37 F.P.C. 993, 994 (1967). The order also recited that it was without prejudice to any pending or future proceedings *Id.* at 995. This order became final in June 1967, and deliveries to FP&L commenced shortly thereafter (Pet. App. 14a).

C. *The 1977 Certificate.*

As part of its effort to find new sources of natural gas for delivery under its warranty contracts with FP&L and FGT, Amoco in 1972 and 1976 entered into exchange and transportation agreements with four interstate pipeline companies for the movement of gas from Amoco's offshore leases to delivery points on FGT's pipeline in Southern Louisiana (Pet. App. 8a-9a, 30a-33a). From these locations, FGT could transport the gas to Florida both for delivery to its own resale customers and for use by FP&L. Since these contractual arrangements required Commission authorization under Section 7 of the Natural Gas Act, Amoco and the four pipelines applied for certificates of public convenience and necessity (*ibid.*).[6]

[6]Several applications were filed (Pet. App. 8a-9a n.1):

(1) Amoco, in FPC Docket Nos. C177-80 and C177-81, for exchanges with Columbia and Natural;

After consolidating all of the applications relating to Amoco's exchange and transportation arrangements for offshore gas (Pet. App. 33a), the Commission on May 2, 1977, issued an order granting the certificate of public convenience and necessity subject to certain conditions (*id.* at 28a-43a).[7] Finding that "the granting of a certificate at this time to provide an additional gas supply for boiler use, in the absence of peculiar circumstances, would not be in the public interest" (*id.* at 36a), the Commission declined to authorize deliveries of gas to FP&L (*ibid.*). Accordingly, the Commission conditioned the certificate to provide "that the gas involved shall be delivered to FGT only in satisfaction of the Amoco-FGT warranty sale, and none of such gas shall be transported to [FP&L]" (*id.* at 42a-43a). In addition, the Commission's order provided that "[t]he certificate issued to Amoco in Ordering Paragraph (A) * * * [authorizing the exchange, transporation and facilities applied for] shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act or of Part 154 or Part 157 of the

(2) Columbia Gulf Transmission Company, in FPC Docket No. CP73-70, for transportation from onshore and offshore fields;

(3) Natural Gas Pipeline Company of America, in FPC Docket No. CP73-157, for transportation from an onshore field;

(4) Sea Robin Pipeline Company, in FPC Docket No. CP77-37, for transportation from an offshore field; and

(5) Columbia Gulf and Tennessee Gas Pipeline Company, in FPC Docket No. CP77-31, for transportation from an onshore field.

[7]The exchange and transportation agreements also involved onshore gas, and the Commission granted without condition the certificate of public convenience and necessity for that gas (Pet. App. 37a).

Commission's Regulations thereunder[8]* * *. The grant of the certificates aforesaid for service to the particular customer involved does not imply approval of all of the terms of the contract, particularly as to the cessation of the service upon termination of said contract as provided by Section 7(b) of the Natural Gas Act" (Pet. App. 41a). In an order issued July 27, 1977, the Commission denied applications for rehearing filed by Amoco and FP&L (*id.* at 45a-49a).

D. *The Court of Appeals' Decision.*

Upon review of the Commission's orders, the court of appeals affirmed (Pet. App. 1a-25a). The court held that "the Commission action was not an amendment or modification of the prior certificates; the Commission's prior actions did not otherwise prevent it from imposing restrictive conditions on the certificates; and the certificate conditions were within its lawful authority" (*id.* at 11a). In upholding the Commission's decision, the court distinguished *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), on the ground that "in this case, the Commission expressly refrained from reopening FGT's transportation certificate docket and limited itself instead to the then-pending applications" (Pet. App. 18a). The court observed that although the Commission's imposition of conditions on the certificates "undoubtedly affects the manner in which [petitioner] would thereafter be able to meet its obligations under the warranty contracts, the

[8]Part 154 of the Commission's Regulations, 18 C.F.R. 154.1 *et seq.*, sets forth filing requirements with respect to rates and charges for any transportation or sale subject to the Commission's jurisdiction. Subpart A of Part 157 of the Commission's Regulations, 18 C.F.R. 157.5-157.22, prescribes requirements for applications for Commission orders permitting abandonment of facilities or service pursuant to Section 7(b) of the Natural Gas Act.

conditions attached * * * only involved new sources of gas, and were based on the strain of the gas shortage and the public convenience and necessity * * *" (Pet. App. 19a). In addition, because the Commission had not amended the existing final certificates, the court rejected petitioner's contention that the Commission's action unlawfully modified the settlement agreement that the Commission had approved and incorporated in the 1967 certificate (*id.* at 11a). Finally, the court held that the Commission had reasonably based its certificate conditions upon a judicially-approved policy of conserving natural gas for essential uses in times of shortage (*id.* at 22a-25a).

ARGUMENT

1. Petitioner's principal contention (Pet. 10-16) is that the court of appeals' decision conflicts with the decision of this Court in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), that outstanding, final certificates may be modified only as authorized by statute. See also *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961). However, in this case, the Commission did not purport to alter an existing certificate (Pet. App. 36a-38a) and, after a thorough review of the record, the court of appeals expressly found that the Commission "did not by the action here amend or modify its prior certificates * * *" (*id.* at 7a). Thus, no question is presented here concerning the power of the Commission to modify outstanding certificates of public convenience and necessity issued under Section 7 of the Natural Gas Act, and the decision of the court of appeals does not conflict with the holding of *United States* v. *Seatrain Lines, Inc.*, *supra*.

Rather, the issue in this case is whether the certificates issued in 1965 and 1967 preclude the conditions imposed

by the Commission in the 1977 certificate. This narrow question was carefully explored by the court of appeals, which, in sustaining the Commission's findings (Pet. App. 38a, 46a-47a), correctly held that "the initial certificates cannot be read as tantamount to a decision on the public convenience and necessity of every subsequent purchase or transportation that might in the future be desired by [petitioner] to comply with the [previously certificated warranty] contracts" (Pet. App. 17a). As the court concluded (*id.* at 19a), the Commission in 1965 and 1967 "did not, and could not, cast off its statutory obligation to judge future applications in light of the public interest at the time of consideration." Indeed, the Commission included in both the 1965 and 1967 certificates an explicit disclaimer of any intention to bind itself in future proceedings (see pages 3, 4, *supra*).[9]

Moreover, the Commission in its 1977 certificate did not "renege" (Pet. App. 20a) on its earlier authorizations. The conditions attached to the 1977 certificate "only involved new sources of gas" (*id.* at 19a) and did not apply to gas sold or transported under the 1965 and 1967 authorizations. In addition, as the court of appeals determined (*id.* at 20a-21a), these conditions were not inconsistent with the prior certificates and did not frustrate petitioner's ability to perform the warranty contracts:

> There is nothing to indicate that [petitioner] will not be able to meet its contract commitments. If it were otherwise, we would address the question anew. But there is no evidence on this record that [petitioner] will be unable to discover and produce gas from

[9]The Commission itself explained (Pet. App. 37a) that its grant of "a certificate to [petitioner] to sell gas to FGT and a certificate to FGT to transport and sell this gas and other gas [petitioner] would sell to [FP&L] did not mean that the Commission undertook to

onshore fields to satisfy its obligations under the contracts. If [petitioner] cannot timely discover and commence production from new onshore fields, it will be forced to purchase gas to meet the warranty obligation to FP&L, probably at a higher cost. Cost alone, however, cannot be a determining factor in a review of the Commission's policy determinations during a natural gas shortage. We do not say that a producer in [petitioner's] situation could never prevail upon this argument. [Petitioner] cannot prevail on this record.

When petitioner sought a certificate for new exchange and transportation arrangements to carry out its warranty contracts with FGT and FP&L, the Commission was required under Section 7 to act in light of the current public interest. Because of acute shortages of natural gas for the interstate market in 1977, the Commission properly concluded that use by FP&L of the offshore gas for boiler fuel was inconsistent with that interest.[10]

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grant all certificates necessary for [petitioner] to carry out its warranty obligations regardless of whether they might not be otherwise in the public interest."

[10]The Commission's decision not to certificate deliveries of gas to FP&L was based on its policy of assigning a low piority to the use of gas as boiler fuel in generating electricity. This policy had previously been approved by this Court. See *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961). See also *City of Willcox* v. *FPC*, 567 F. 2d 394, 405-408 (D.C. Cir. 1977); *Arkansas Power & Light Co.* v. *FPC*, 517 F. 2d 1223, 1228-1229 (D.C. Cir. 1975), cert. denied, 424 U.S. 933 (1976); *State of Louisiana* v. *FPC*, 503 F. 2d 844, 858-860 (5th Cir. 1974).

Petitioner now suggests (Pet. 13 n.5) that federal policy regarding the use of natural gas as boiler fuel may have changed since the Commission issued the orders under review. As a certificate holder, petitioner can apply to the Commission for amendment of its certificate under Section 7 and 18 C.F.R. 157.5 *et seq.*. In this way, petitioner may seek to have modified the order it challenges here.

Nothing in its prior actions required the Commission in 1977 to issue certificates for such use contrary to its statutory responsibilities.[11]

2. Petitioner claims (Pet. 16-18) that the Commission has improperly overriden the previously approved 1967 settlement. See, *e.g.*, *Tennessee Gas Pipeline Co.* v. *FPC*, 504 F. 2d 199 (D.C. Cir. 1974); *Texas Eastern Transmission Corp.* v. *FPC*, 306 F. 2d 345 (5th Cir. 1962), cert. denied, 375 U.S. 941 (1963). However, this contention overlooks the principle that what controls is the Commission's approval of the settlement as embodied in the authorized certificate, not the settling parties' assumptions. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 313-314 (1974); *Pennsylvania Gas & Water Co.* v. *FPC*, 463 F. 2d 1242, 1246 (D.C. Cir. 1972). For the reasons discussed above, the 1977 certificate did not modify the 1967 certificate. Furthermore, when the Commission approved the 1967 settlement, it did not purport to

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[11]We also note that the condition in Paragraph (D) of the 1977 order (Pet. App. 41a) simply reiterated the well-established principle that Commission authorization is required for cessation of interstate service under a Section 7 certificate. See, *e.g.*, *United Gas Pipe Line Co.* v. *McCombs*, No. 78-17 (June 18, 1979); *California* v. *Southland Royalty Co.*, 436 U.S. 519 (1978); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960). Neither of the previously issued certificates purported to contain a waiver of the Section 7 abandonment requirement or an advance grant of abandonment authorization. On the contrary, the 1965 certificate expressly stated that its action was not a waiver of the Commission's abandonment regulations (18 C.F.R. Part 157). See *Pan American Petroleum Corp.*, *supra*, 34 F.P.C. at 855. Thus, the 1977 certificate imposed no new conditions in this regard. Moreover, the Commission recognized that approval of the warranty contracts might undermine regulatory control over abandonment. Accordingly, the 1965 and 1967 orders required petitioner to identify and to report to the Commission any changes in the fields and parties serving as supply sources. See page 3, *supra*. This requirement was a plain warning that petitioner could not justifiably rely upon the prior certificates as a kind of advance Commission approval of any interstate service it might decide to initiate or terminate.

relinquish its statutory duty to assess future applications under Section 7 of the Act. Instead, it expressly reserved that authority (see pages 3, 4, *supra*). Thus, the 1977 certificate is fully consistent with the general rule that settlements accepted by the Commission are binding upon it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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